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90-997

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STEVEN K. ORSBURN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Military Appeals

PETITION FOR A WRIT OF CERTIORARI

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December 1990

QUESTION PRESENTED

Whether the petitioner was denied a fair trial when the military judge admitted into evidence books of a sexually explicit nature, which books were not shown to the alleged victim, nor were they used in any manner in committing the alleged offenses, and were irrelevant, inadmissible, and highly prejudicial?

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UNITED STATES OF AMERICA,

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Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Steven K. Orsburn, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on September 26, 1990.

OPINIONS BELOW

The United States Air Force Court of Military Review issued an unreported decision on July 31, 1986 (Appendix D). This same court issued another unreported decision on August 5, 1988 (Appendix C). Finally, the court issued a third unreported decision on July 18, 1989 (Appendix B). The second decision was issued in response to a remand from the United States Court of Military Appeals. That order is reported at 26 M.J. 287 (C.M.A. 1988) (Appendix E). The third decision of the Air Force Court of Military Review was issued following a rehear-

ing on sentence. On September 26, 1990, the United States Court of Military Appeals issued an opinion at 31 M.J. 182 (C.M.A. 1990), in which then-Chief Judge Everett dissented (Appendix A).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on September 26, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259 (3) (Supp. 1989) and 10 U.S.C. § 867(h) (Supp. 1989).

STATEMENT OF THE CASE

In September and October 1985, and November 1988, the petitioner, an Air Force staff sergeant (E-5), was tried by a general court-martial at Luke Air Force Base, Arizona. Contrary to his pleas, he was convicted of rape, oral sodomy, and indecent acts, lesser included offenses of additional charges of rape and sodomy.

The petitioner was initially sentenced to a dishonorable discharge, confinement for 25 years, forfeiture of all pay and allowances, and a reduction to airman basic (E-1). The finding of guilty to one of the lesser included offenses was modified, and the sentence was approved by the general court-martial convening authority, the initial level of review in the military, on February 28, 1986. The Air Force Court of Military Review affirmed the sentence as approved on July 31, 1986.

On April 29, 1988, the United States Court of Military Appeals, after granting review, returned the case to The Judge Advocate General for submission and further review by the Air Force Court of Military Review. That court, on August 5, 1988, set aside and dismissed the findings of guilty of the lesser included offenses and ordered a rehearing on sentence. Upon rehearing, the petitioner was sentenced to a dishonorable discharge, confinement for eighteen years, total forfeitures and reduction to airman basic (E-1). The convening authority ap-

proved this sentence on February 7, 1989. The Air Force Court of Military Review affirmed it as approved on July 18, 1989.

The government's evidence consisted mainly of the testimony of the victim, petitioner's daughter, and four books. Petitioner's daughter, K, age 8 at the time of trial, related to her friends, incidents of sexual conduct in April 1985 with her father. These disclosures set in motion a chain of events which included a search of appellant's home. Among other things, four books were found in a bag kept in the closet of the master bedroom. The victim identified one, *More Joy of Sex*, as a book she looked at with the petitioner. She could not identify the other three books entitled *Degraded, Delighted Daughter; Chained Youth: Girls In Bondage*; and *The Whore Makers*, later introduced at trial as prosecution exhibits 6, 7, and 8, respectively. These books consisted primarily of written material and were not picture manuals.

At a pretrial hearing on September 4, 1985, defense counsel moved to suppress prosecution exhibits 6, 7, and 8.[1] He based this motion on two avenues of attack. First, the search warant was based on unreliable information and overly broad in that it authorized seizure of pornographic material without defining pornography.[2] Secondly, he argued the books were not relevant, inadmissible and more prejudicial than probative. The military judge deferred ruling on the motion. On September 30, 1985, again prior to the findings portion of trial, counsel renewed his motion. The military judge found that there was probable cause to issue the search warrant and that it was not overly broad. He deferred ruling on the admissibility of the books until the conclusion of the presentation of evidence by prosecution and defense.

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[1] Trial defense counsel did not object to *More Joy of Sex*, prosecution exhibit 4.

[2] The issue was hotly contested at trial. R. 121-134, 169-195. The petitioner still asserts that the search was illegal, for the reasons indicated above.

On October 1, 1985, the prosecution rested its case. Defense counsel, outside the hearing of the members (military jurors), asked the military judge if he had "reached a ruling on the admissibility of the books in question?" The military judge held the books were relevant to show the petitioner's intent at the time of the charged offenses, considering the specific intent element of lesser included offenses like attempted sodomy and indecent acts. Further, he found the probative value of the books did not significantly outweigh their potential prejudice and ruled they were admissible. The government reopened its case and introduced the books as evidence of intent. The judge instructed the members both after their admission and prior to deliberations that the books were to be used only on the issue of specific intent within any lesser included offenses.

The Air Force Court of Military Review, the first level of military appellate review, agreed with the military judge, holding that the books were relevant and material to the issue of the petitioner's sexual desires during the charged offenses. *United States v. Orsburn*, ACM 25199 (A.F.C.M.R. August 5, 1988) (f rev) (Appendix C).

The same issue was raised at the United States Court of Military Appeals, the second level of military appellate review. The Court of Military Appeals held the books were relevant to show the petitioner's intent concerning the lesser included offenses and the military judge did not abuse his discretion admitting them. The court specifically rejected the petitioner's argument that, because of the unambiguous nature of the alleged acts, his intent at the time of the offenses was never a real or material issue. Then-Chief Judge Everett, in his dissent, disagreed with the court and stated that intent was uncontested and the military judge abused his discretion when he rejected the argument that the probative value of the books outweighed their prejudicial impact. *United States*

v. Orsburn, 31 M.J. 182 (C.M.A. 1990) (Everett, C.J., dissenting) (Appendix A).

REASONS FOR GRANTING THE WRIT

I

The admission of proof of "other crimes" is one of the most frequently litigated areas of the law. "[N]o part of the law of evidence is more consistently and violently litigated than that having to do with the admissibility of proof of other crimes." Morgan, Maguire & Weinstein, Evidence: Cases and Materials, 380 (4th ed. 1957). What was true prior to the promulgation of the Federal Rules of Evidence, is still true with regard to Rule 404(b). Given the similarity of the federal and military rule, the issue presented in this case is not unique to the military, but rather is common to many child sexual abuse prosecutions.[3] Further, underlying the decision of the Court of Military Appeals, is a disagreement between the United States courts of appeals and state courts concerning whether intent, when it is an element of the offense, must actually be disputed before evidence of prior bad acts may be admitted.

Child sexual abuse is a crime committed in private. The only witnesses are the victim and the perpetrator. Litigation during trial often centers on prior statements, excited utterances, or evidence of other crimes, wrongs, or acts. The propensity rule was developed not because

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[3] Military Rule of Evidence 404(b) is the same as its federal counterpart.

> Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes
>
> *(b) Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

introducing evidence of other crimes, wrongs, or acts runs afoul of logic, rather the logical force of this evidence is what makes it so prejudicial. Judge Learned Hand aptly noted "its exclusion is rather because the issue is practically unmanageable than because it is not rationally relevant." *United States v. Lotsch*, 102 F.2d 35, 36 (2d Cir.), *cert. denied*, 307 U.S. 622 (1939). This Honorable Court recognized that incongruity stating: "the inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury . . . ." *Michelson v. United States*, 335 U.S. 469, 475-476 (1948).

In the instant case, the failure to prohibit the admission of the three sex-books denied the petitioner his right to a fair trial. He now stands convicted based, at least in part, on his possession of three "dirty" books. Simple possession of the books is not an offense. They are books and not photographic journals or magazines. There are no pictures of very young, naked children in any of them. *See Orsborne v. Ohio*, —— U.S. ——, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990).

The plots of the books, vulgar and perverse, involves sex with teenage girls, not children. The Air Force Court of Military Review, in its unreported decision on August 5, 1988 (Appendix C), apparently found the descriptions of sexual acts between adult males and teenage girls sufficiently similar to sexual conduct between an adult and a young child to be relevant to determining the petitioner's intent. The Court of Military Appeals found enough significance in the titles alone to find the subject matter relevant. The books "had titles which to different degrees reasonably suggested sex with children." *United States v. Orsburn*, 31 M.J. at 186. However, the descriptions of sexual intercourse, oral and anal sodomy found in the contested books are only relevant in the broadest sense of the word. The fact is the teenagers involved in the plots are at least twice the age of the petitioner's daughter.

Both courts below relied a great deal on the fact that the books were discovered in a paper bag kept in a closet at the scene of some of the offenses. *See United States v. Mann*, 26 M.J. 1 (C.M.A.), *cert. denied*, 488 U.S. 824 (1988). That fact offers no relief. The acts described in the books are not sufficiently similar to the charged offenses to be relevant to the issue of intent. *United States v. Ross*, 886 F.2d 264, 267 (9th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 1818, 108 L.Ed.2d 947 (1990).

The victim claimed that the petitioner had "shown her pictures in a dirty magazine of people humping." She identified a soft cover copy of *More Joy of Sex* as a book she had been shown. There was no evidence that the petitioner ever read or showed the other three books to the victim or that she read them. The books simply are not relevant to the charged offenses.

Further, intent was not a material issue in petitioner's case, therefore the books were both irrelevant and inadmissible under Military Rule of Evidence 404(b). *United States v. Huddleston*, 485 U.S. 681, 686 (1987); *United States v. Ross*, 886 F.2d at 267. The military judge ruled the books were admissible because they tended to show the intent required with lesser included offenses such as indecent assault or indecent acts, both requiring proof of a specific "intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of" the petitioner. *See*, para. 45d(1)(c) and (2)(a) and para. 51(d)(1)(b) and (d)(3)(a), Part IV, Manual for Courts-Martial, United States, 1984. However, merely because intent is a required element of potential lesser included offenses does not mean it was a material issue.

Sexual intercourse and sodomy are unambiguous by their very nature. These were the acts described by the victim. The intent of the perpetrator to satisfy his sexual passions is obvious. In contrast, the reason one might fire a rifle at a passing helicopter is not immediately clear. It may have been accidental or willful. *United*

States v. Webb, 625 F.2d 709 (5th Cir. 1980). An act of manipulating a child's genitalia may not amount to taking indecent liberties, depending on the facts and the intent of the perpetrator. *United States v. Beahm*, 664 F.2d 414 (4th Cir. 1981). Undressing a child is an ambiguous act and not indecent without proof of intent. *United States v. Cuellar*, 27 M.J. 50 (C.M.A. 1988). If "intent is not normally inferable from the nature of the act charged," then other acts evidence may be admissible, even if intent is not actively contested. *United States v. Webb*, 625 F.2d at 710; *United States v. Ring*, 513 F.2d 1001, 1009 (6th Cir. 1975). Intent was inferable from the nature of the acts described and charged in the instant case. It was not actively contested. The opening and closing arguments of both counsel make it clear that the petitioner maintained the acts did not occur and the victim was lying.

This Honorable Court agreed, albeit *sub silentio*, that even when intent was an element of the charged offense, it was preferable for a court to wait until the presentation of evidence was over in order to determine whether intent, for example, is a material issue and other acts evidence is therefore admissible. *United States v. Brunson*, 549 F.2d 348 (5th Cir.), *cert. denied*, 434 U.S. 842 (1977). There is disagreement between the United States courts of appeals and the state courts, about whether intent, when it is an element of the offense, must actually be disputed before evidence of prior bad acts may be admitted by the government to show intent. *Compare United States v. Hadley*, 1990 U.S.App. Lexis 19912 (9th Cir. Nov. 14, 1990) (Specific intent was an element of the offense and the government was permitted to use prior bad acts' evidence to prove that element) *with United States v. Landrum*, 559 A.2d 1323 (D.C. App. 1989) (Evidence of other crimes to prove intent prejudicial *per se* and inadmissible as a matter of law) and *People v. Ward*, 188 Cal.App.3d 459, 233 Cal.Rptr. 477 (1986) (Prior sex offenses are not generally admis-

sible to prove intent unless the defendant has actually placed the element in issue). The Court of Military Appeals cited this disagreement between the courts as a reason it rejected petitioner's argument that, given the unambiguous nature of the acts in his case, intent was not a material issue. While the existence of a disagreement is a reason for this Court to grant petitioner a *writ of certiorari*, it is not a valid reason to affirm the lower court.

The Court of Military Appeals also relied on the fact that the members could disbelieve the victim and find that intercourse and sodomy were not committed, but that the petitioner engaged in other more ambiguous conduct in which case intent would be a material issue. Of course, as in any trial, the members might not believe the victim. However, that does not change the nature of her testimony or the petitioner's defense. The victim described acts of intercourse and sodomy. The petitioner denied it happened. The element of intent was uncontested.

The Court of Military Appeals reasoned that because defense counsel in this case "insisted" that the judge rule at the close of the prosecution's case and would not assure the court that intent would not be disputed, then intent remained at issue. *United States v. Orsburn*, 31 M.J. at 188. However, this reasoning is not supported by the record. The defense counsel asked the judge if he had decided counsel's motion. The military judge never asked if intent was at issue. In fact, it is clear from the judge's questioning of counsel that he recognized the material issue was the victim's credibility.

Finally, but importantly, the limited relevance, if any, of these disgusting and repulsive books is substantially outweighed by their prejudicial impact. How any impartial fact finder can read these without becoming impassioned or incensed is difficult to imagine. The primary and overriding inference drawn from this material is that

whoever reads these books is immoral and likely to engage in perverted sexual activity. It is this very inference that Rules 403 and 404 (b) seek to avoid.

CONCLUSION

The petitioner's case is worthy of Supreme Court review. In particular, this case offers a unique opportunity to address nationwide problems in child sexual abuse prosecutions. First, this Court can settle the disagreement between the courts concerning whether intent, if it is an element of the charged offense, must actually be disputed before evidence of prior bad acts may be admitted. Second, following *Huddleston* and *Ross*, may the government use "dirty" books, unrelated to the charged offenses except in the most general sense, to prove intent?

Respectfully submitted,

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December 1990

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 56,370

ACM 25199

UNITED STATES,

Appellant.

v.

STEVEN K. ORSBURN, Staff Sergeant, U.S. Air Force,

Appellee,

Argued May 9, 1990

Decided Sept. 26, 1990

For Appellant: *Major George P. Clark* (argued); *Colonel Richard F. O'Hair* (on brief).

For Appellee: *Captain James C. Sinwell* (argued); *Colonel Robert E. Giovagnoni* (on brief); *Colonel Joe Lamport and Major Terry M. Petrie.*

OPINION OF THE COURT

SULLIVAN, Judge:

In the fall of 1985 appellant was tried by a general court-martial with members at Luke Air Force Base, Arizona. Contrary to his pleas, he was found guilty of rape,[1] three specifications of sodomy, and four specifications of committing indecent acts upon a child under 16 years of age, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 USC §§ 920, 925, and 934, respectively. He was sentenced to a dishonor-

[1] He was found guilty of raping his daughter on "divers occasions between 10 August 1984 and 24 April 1985."

able discharge, confinement for 25 years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority modified one specification of indecent acts so as to limit the findings of acts occurring at Davis-Monthan Air Force Base, Arizona, but otherwise approved the findings of guilty and the sentence as adjudged. The Court of Military Review further modified the findings of guilty in accordance with the applicable statute of limitations and affirmed the sentence in an unpublished opinion dated July 31, 1986.

This Court set aside the decision of the Court of Military Review for several reasons and returned the record of trial to the Judge Advocate General of Air Force for resubmission to that court. 26 MJ 287 (1988). Upon further review, the Court of Military Review dismissed Additional Charges I and II, and their indecent-act specifications, and ordered a sentence rehearing on the remaining findings of guilty in an unpublished opinion dated August 5, 1988. Before a military judge sitting alone at this sentence rehearing, appellant was sentenced for rape (Charge I) and sodomy (Charge II) to a dishonorable discharge, confinement for 18 years, total forfeitures, and reduction to the lowest enlisted grade. The Court of Military Review again affirmed these findings of guilty and the new sentence in an unpublished opinion dated July 18, 1989.

This Court granted review of the following issue raised by appellate defense counsel:

> WHETHER THE MILITARY JUDGE ERRED BY ADMITTING INTO EVIDENCE PROSECUTION EXHIBITS 6, 7, AND 8, BOOKS OF SEXUALLY EXPLICIT NATURE, WHICH BOOKS WERE NOT SHOWN TO THE ALLEGED VICTIM, NOR WERE THEY USED IN ANY MANNER IN COMMITTING THE ALLEGED OFFENSES, AND WERE, HENCE, IRRELEVANT, INADMISSIBLE, AND HIGHLY PREJUDICIAL.

We hold that the military judge did not err by admitting the challenged prosecution exhibits. *See United States v. Mann*, 26 MJ 1 (CMA), *cert. denied*, 488 U.S. 824, 109 S.Ct. 72, 102 L.Ed.2d 49 (1988).

The following evidence exists in the record of trial. Appellant's daughter, K, age 8 at the time of trial, related to her friends incidents of sexual conduct in April 1985 with her father. These disclosures set in motion a chain of events which included a search of appellant's home. Among other things, three paperback books entitled *Degraded, Delighted Daughter; Chained Youth: Girls in Bondage;* and *The Whore Makers* were discovered in the master bedroom closet. These books were later identified at trial as prosecution exhibits 6, 7, and 8, respectively.

At a pretrial hearing on September 4, 1985, defense counsel moved to suppress the books. He said, answering the judge's inquiry as to additional motions:

> DC: Yes, Your Honor. The defense moves for appropriate relief in the form of in limine relief and this relates to once again, the books that were seized on 30 April 85, the books that have been described to you previously. *Specifically, Your Honor, we are asking that no mention be made of the books and that the books not be presented to the court members in the prosecution case in chief.*
>
> We would argue that to be admissible under 404b, Military Rule of Evidence 404b, the prosecution must state, number one, the clear purpose of the offering of the evidence. We rely here on the cases of *Peterson* at 20 M.J. 806, Navy Court opinion 1985. *Rappaport*, 19 M.J. 708 and *Brannan*, 18 M.J. 181. Second, the prosecution must explain the nexus, or connection, between the books and the crimes charged. That is rape and sodomy. Specifically they must explain the relevance that these books have to a con-

tested issue in the case. We rely on the *United States v. Janis*, 1 M.J. 395, Court of Military Appeals case 1976.

Thirdly, they must state how the introduction of these books into evidence would help to prove an element or a contested issue of the crimes charged. Once again, *United States v. Janis.* We would suggest, Your Honor, that the titles of these books are not necessarily descriptive of the contents contained therein. Second, that there is no evidence that these books were used in the commission of a crime. And thirdly, that these books are not evidence of a crime and rely on the *United States v. Vanhoose*, because there is no indication that possession of these books violated any statute, nor another act, because these books in and of themselves are not an act.

In order for the prosecution to successfully introduce this evidence in the case in chief, there must be plain, clear, conclusive evidence to support either that these books are a crime, a wrong or an act. *If the prosecution were to offer these books, the only purpose they can offer them for is for the proposition that because the accused has these books in his possession he is more likely to have committed these offenses.* It is not as though they are offering these books as evidence that he has committed similar acts previously with other children. *We would suggest as well, Your Honor, to allow these books into evidence would serve unfair prejudice to the accused. Specifically, the jury would have an undue tendency to decide the issue of his guilt or innocence on an improper basis, specifically an emotional one.*

MJ: Trial counsel do you have comment?

TC: Yes, Your Honor.

MJ: Before hearing your comment I assume that as opposed to a Motion in Limine, this would, presuming arguendo that I find the warrant valid and

would tell the prosecution that they could introduce these books into evidence, that this as opposed to a Motion in Limine is probably an objection for lack of relevance. Is that correct counsel?

DC: That's another way of putting it Your Honor. *Lack of relevance as well as unfair prejudice.*

(Emphasis added.) The military judge deferred ruling on this motion.

On September 30, 1985, the motion was argued again. The prosecution disclosed that four other pornographic books discovered at the same time were not to be offered in evidence by the Government. As for the contested books, in relevant part, the military judge entered the following ruling:

> Now concomitant with that is the secondary motion of a Motion in Limine. This is two-fold, although I find the search to have been a reasonable legal search, *the issue remains before us whether* the three books, those being, "Degraded, Delighted Daughter," "Chained Youth," and the "Whore Makers," *are relevant to the proceeding before us. I am defering my ruling on the admissibility of these three books until such time as both sides have concluded the presenment of their evidence.* In other words I am not considering it solely for rebuttal, but I am going to observe the status of the evidence until before making a determination as to whether I will allow these three items into evidence.

(Emphasis added.)

On October 1, 1985, the prosecution rested their case. Defense counsel thereupon requested an Article 39(a), UCMJ, 10 USC § 839(a), session and asked the military judge if he had "reached a ruling on the admissibility of the books in question?" The following colloquy ensued:

M.J. Does either counsel have any further input on the admissibility of Prosecution Exhibits 6, 7, and 8 for identification?

DC: We do not, Your Honor.

TC: No sir.

MJ: Now defense counsel corect me if I am wrong, but from the tenor of some motions and cross-examination as I would view it, some degree of the essence of the defense case to be, that these offenses never occurred and that the alleged victim, [K], is other than a truthful person. Is that correct?

ADC: One moment please, Your Honor. Sir, in attempting to answer the judge's inquiry, defense is trying to weigh exactly how it plans tactically to do its case. *Whether or not to put any evidence on, and at this time at least, defense does not believe that we can answer that question with any degree of certainty.*

MJ: Well haven't we asked questions during cross-examination pertaining to whether she has had problems with truthfulness?

ADC: I believe we have asked questions trying to test whether or not she is telling the truth, to that extent, yes.

MJ: And I believe there have been motions, such as bringing up shoplifting and the fact that she lied about shoplifting, areas such as this. Is that correct?

ADC: I believe the prosecution has made a Motion in Limine anticipating that we would bring those up and at this point, at least tactically speaking, we are not saying that we necessarily would try to elicit truth and veracity information from any witnesses because *we don't know at this point whether we plan to put any evidence on. That was wholly contingent sir on your ruling on these books.*

MJ: Do you mean counsel, that as of right now tactically you don't know what your case is going to consist of, even though you are going to have to start it in about 10 minutes?

ADC: Sir, that is absolutely correct. *Based on what we've seen today, we would like to look over the evidence and talk with our client and decide whether or not he would like to testify, all these tactical considerations that would go into whether to put evidence on or not put evidence on, we have not made those yet.*

MJ: Very well counsel as pertains to Prosecution Exhibits 6, 7 and 8 for identification. Obviously I have given considerable thought to this over the past month and the two days that we've been here, and I would concur with defense counsel I think it has a considerable amount of impact. *I feel that considering the specific intent of some of the lesser included offenses*, such as attempt to commit sodomy and perchance indecent assaults with the specified specific intent to satisfy one's sexual gratification, *that the Prosecution exhibits do in fact have a relevance and a bearing upon intent in this case.* Further, as I perceive it, from the questions that have been asked on cross-examination is we are talking about the credibility of the alleged victim, [K], as such I feel that there would be opportunity upon rebuttal and perchance from what has been brought up *so far to allow these books in as to her credibility, although these specific books are not alleged to have been utilized during, before any sex attack they are consistent with her testimony of dirty movies, dirty records and magazines.* I have specifically considered the potential prejudicial impact in accordance with MRE 403 and I find that the relevance overcomes any possible prejudice. I will of course instruct the members of the court as to the sole use that they can apply these books to. Further in considering the admissibility of these three particular books is upon the allegations that most specifically these events occurred as recent as 25 April 1985 and further events on the 27th April 1985, I find that the books being

found during a search accomplished on the 30th April 1985, have a direct nexus in time. That the books were further recovered from an area that is alleged to be one of the three crime scenes and that the contents of the books are totally consistent with the concept of intent. Prosecution Exhibits 6, 7 and 8 for identification are admitted as Prosecution Exhibits 6, 7 and 8 respectively. As there other issues counsel?

(Emphasis added.)

The military judge then allowed the Government to reopen its case and introduce the challenged evidence. Then the following exchange occurred:

TC: Your Honor, the prosecution has nothing further. At this time we rest again.

MJ: Defense, would you request at this time, since trial counsel has provided us with some detail of the Prosecution Exhibits-4, 6, 7, and 8, that the court members be instructed upon their utilization, or would you prefer to wait until a later date?

DC: We prefer that it be done at this time.

MJ: Very well. Members of the court, as I have admitted into evidence, Prosecution Exhibits, 6, 7, and 8, which you have not heard, but you've heard the titles of these particular paperback books, there is the possibility that some people could, per chance, be offended by the subject matter of these books. I want to bring your attention and emphasize that the possession of these books is not illegal. There is nothing alleged by the prosecution that there is anything about the substance or the books themselves which is illegal. I have admitted these books for the sole purpose, for a very limited purpose, and the only purpose which you could consider these books for or any evidence that they might have to tend to prove or disprove a specific intent of which I will instruct you later as to some of the lesser included offenses, that

> would be the attempt to commit a certain crime or the intent to satisfy sexual gratification. The intent would be the only reason that you can consider these books to determine whether it tends to prove or disprove that intent. You may not conclude from this evidence that the accused is a bad person, a person of bad moral character, or otherwise inclined to commit these or any other crimes.

Finally, the military judge in his closing instructions to the members reminded them as follows of the limited use of the challenged evidence:

> I want to direct your attention to the Prosecution Exhibits-6, 7 and 8, once again, and I want to emphasize to you the very limited purposes for which I have allowed these three exhibits into evidence in this trial. They may be considered by you for the one limited purpose of their tendency, if any, to either prove or disprove the intent of the lesser included offenses as to assault with the specific intent to commit rape or the specific intent to gratify sexual desires. You may not consider this evidence for any other purpose, and you may not conclude from this evidence that the accused is a bad person, a person of bad morals, has criminal tendencies, and that he therefore committed the offenses as charged.

The defense by means of a motion in limine attempted to prevent the prosecution from introducing evidence that tended to show appellant possessed child-related sex material in his home around the time of some of his alleged sex offenses against his minor daughter. *See* RCM 906(b)(13), Manual for Courts-Martial, United States, 1984. The challenged evidence consisted of testimony from Agent Meduna that three paperback books were found in the Orsburns' residence on April 30, 1985. Moreover, the books themselves were admitted into evi-

dence and had titles which to different degrees reasonably suggested sex with children. Appellate defense counsel argues that this government evidence was inadmissible under several related rules of evidence, and its improper admissions at this court-martial denied appellant a fair trial.

The legal basis for the defense's evidentiary arguments both at trial and on appeal is Mil.R.Evid. 404(b), Manual, *supra*, which states:

> (b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Appellant stops short of asserting that the military judge directly violated this rule. In other words, he does not claim the judge admitted the challenged evidence to show that he was a sexual pervert and thus probably committed the charged sexual offenses. Instead, he contends that the military judge erred in holding this evidence was relevant to show his intent at the time of the charged offenses, an evidentiary purpose permitted by Mil. R. Evid. 404(b). Consequently, he argues the members could only have considered this evidence to show his sexual character or disposition. In the alternative, he asserts that, even if this evidence was relevant to show his intent at the time of the charged offenses, intent was not an issue in this case so as to permit its admission under Mil.R.Evid. 404(b). Finally, he asserts that, even if the challenged evidence was admissible to show intent in this case, this evidence was so volatile or unduly prejudicial that its admission was barred by Mil.R.Evid. 403.

Appellant's initial argument on relevance was fully considered by the judge and the Court of Military Re-

view. He basically asserts that a connection or direct relationship was not established between these books and himself, the alleged victim, or the alleged crimes. *See* Mil.R.Evid. 401 and 402. We disagree and join the military judge and the court below in rejecting this argument. *See generally United States v. Mann, supra.*

Appellant was found guilty and stands guilty today of raping his minor daughter on divers occasions between August 10, 1984, and April 24, 1985, at Luke Air Force Base, Arizona. He also was found guilty of sodomizing his daughter in various ways during this same period and at this same place as well as on April 27, 1985. He was also charged with carnal knowledge on these occasions for which he was found not guilty. Lesser offenses of the above crimes include indecent assault and indecent acts on a child, which the members were instructed on by the military judge. *See* para. 45d(1)(c) and (2)(a), as well as para. 51(d)(1)(b) and (d)(3)(a), Part IV, Manual, *supra.* A specific "intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of" an accused is an element of these lesser offenses. Para. 87b(1)(d) and 2(e), as well as para. 63b(2), Part IV, Manual, *supra.*

The military judge has the initial responsibility to determine whether evidence is relevant within the meaning of Mil.R.Evid. 401. We will not overturn his decision on these matters unless it is a clear abuse of discretion. Here the alleged sexual offenses with the accused's daughter purportedly occurred at his home on Luke Air Force Base between August 1984 and April 27, 1985. The challenged books, dealing with sex with children or young girls (*see Osborne v. Ohio,* —— U.S. ——, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990), were found at the situs of the alleged sexual offenses, around the time of these offenses, and in an area under at least partial control of appellant. These circumstances were a sufficient basis for the judge to find the challenged evidence tended to show appellant had the requisite sexual desires for conviction

of the lesser-included offenses. *United States v. Mann, supra. See Simon v. State*, 743 S.W.2d 318, 324 (Tex. App.—Houston [1st Dist.] 1987); *State v. Fletcher*, 174 Kan. 530, 256 P.2d 847, 848-49 (1953); *People v. Herman*, 97 Cal.App.2d 272, 217 P.2d 440 (2 Dist.1950).

Nevertheless, appellant asserts that, because of the unambiguous nature of the charged acts, his intent at the time of their commission was never a real or material issue in this case. In other words, if he engaged in sexual intercourse or sodomy with his daughter as alleged, there would be no question of his intent in doing these acts. *See People v. Hansen*, 708 P.2d 468, 471 (Colo.App. 1985); *People v. Kelley*, 66 Cal.2d 232, 57 Cal.Rptr. 363, 372, 424 P.2d 947, 956 (1967). *See generally People v. McDonald*, 542 N.Y.S.2d 42, 150 A.D.2d 805 (2d Dept. 1989). Therefore, he suggests that admission of the challenged evidence in the Government's case in chief or at any time for this purpose was a sham and not authorized by Mil.R.Evid. 404(b). *See generally United States v. Reynolds*, 29 MJ 105, 110 (CMA 1989); *United States v. Cuellar*, 27 MJ 50 (CMA 1988), *cert. denied*, —— U.S. ——, 110 S.Ct. 54, 107 L.Ed.2d 23 (1989). We disagree with this argument in the present case for several reasons.

First, we note that the military judge initially stated that he would not rule on admissibility of the books until both sides presented their cases. However, it was defense counsel who insisted that the judge rule at the close of the prosecution's case. *United States v. White*, 25 MJ 50, 52 (CMA 1987). Second, defense counsel refused to commit himself at that time on the issue of intent or provide any assurances to the judge that he would not dispute that issue. *See United States v. Webb*, 625 F.2d 709, 710 (5th Cir.1980). Third, there is a legitimate disagreement not only in the various United States Courts of Appeals, but also in the state courts, on whether the intent must be actually disputed before evidence of prior

bad acts may be admitted by the Government to show intent. *See* cases cited in 2 Wigmore, *Evidence* §§ 307 and 360 (Chadbourn rev.1979). Fourth, the members could have partially disbelieved the victim and found that the acts of sexual intercourse or sodomy were not committed by appellant but that he did engage in other conduct more ambiguous in nature.[2] Then intent would be a material issue in this case. *See generally United States v. Beahm*, 664 F.2d 414 (4th Cir.1981).

Appellant in his final argument suggests this sex-book evidence was so "emotional" or "repulsive" that its admission even for a valid purpose under Mil.R.Evid. 404(b) was unduly prejudicial. Mil.R.Evid. 403. We note that the judge specifically ruled on this question, and his decision should not be lightly disregarded. *See United States v. Abel*, 469 U.S. 45, 54-55, 105 S.Ct. 465, 470-471, 83 L.Ed.2d 450 (1984). Moreover, he twice instructed the members that they could consider the challenged evidence only on lesser offenses to those charged, which are not the subject of this appeal. In addition, the judge twice instructed the members that they could not consider this evidence to show appellant was a bad man and probably did the charged offenses. In the absence of evidence to the contrary, we must presume the members did not consider this evidence at all with respect to the findings of guilty before us. *See United States v. Ricketts*, 1 MJ 78 (CMA 1975). Accordingly, reversal on the basis of Mil.R.Evid. 403 is not warranted. *United States v. Owens*, 21 MJ 117, 124 (CMA 1985).

The decision of the United States Air Force Court of Military Review is affirmed.

Judge COX concurs.

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[2] For example, appellant was found guilty of committing indecent acts under the original charges of rape and sodomy, in Additional Charges I and II. These charges, however, were dismissed on the basis of the statute of limitations; therefore, we need not consider admissibilty of the challenged evidence with respect to them.

EVERETT, Chief Judge (dissenting):

I dissent because I conclude that here the military judge abused his discretion by rejecting the argument that the probative value of the evidence as to the uncontested element of intent is substantially outweighed by its prejudicial effect. *See* Mil.R.Evid. 403, Manual for Courts-Martial, United States, 1984.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 25199 (reh)

18 July 1989

UNITED STATES

v.

Staff Sergeant STEVEN K. ORSBURN, FR 526-13-0344
UNITED STATES AIR FORCE

Sentence adjudged 22 November 1988 by GCM convened at Luke Air Force Base, Arizona. Military Judge: Linda D. Carter (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for eighteen (18) years, forfeiture of all pay and allowances and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Major Frank J. Spinner.

Appellate Counsel for the United States: Colonel Joe R. Lamport; Lieutenant Colonel Robert E. Giovagnoni; Major Kathryn I. Taylor and Captain Joseph V. Treanor, III.

Before

FORAY, MICHALSKI and MURDOCK
Appellate Military Judges

DECISION UPON REHEARING

PER CURIAM:

In our initial review of this case we affirmed modified findings of guilty and the sentence as adjudged. Unpub-

lished opinion, *United States v. Orsburn*, No. 25199 (A.F.C.M.R. 31 July 1986). On 19 August 1987, the Court of Military Appeals granted appellant's petition for review of our decision. *United States v. Orsburn*, 25 M.J. 162 (C.M.A. 1987). On 28 April 1988, that Court set aside our original decision in the case and returned the record of trial to The Judge Advocate General for resubmission to us for further proceedings. *United States v. Orsburn*, 26 M.J. 287 (C.M.A. 1988). In our further review of this case, we set aside the approved findings of guilty of Specification 1, Additional Charge I, and Specifications 1, 2, and 3, Additional Charge II, ordered them dismissed, and approved the remaining findings of guilty. We further set aside the sentence and ordered a rehearing thereon. Unpublished opinion, *United States v. Orsburn*, No. 25199 (f rev), (A.F.C.M.R. 5 August 1988).

A rehearing on the sentence in this case was held pursuant to our mandate on 21 and 22 November 1988, and the case is again before us for review.[1] Appellant assigns as error:

> WHETHER THE MILITARY JUDGE ERRED BY ADMITTING INTO EVIDENCE PROSECUTIONS EXHIBITS 6, 7, AND 8, BOOKS OF SEXUALLY EXPLICIT NATURE, WHICH BOOKS WERE NOT SHOWN TO THE ALLEGED VICTIM, NOR WERE THEY USED IN ANY MANNER IN COMMITTING THE ALLEGED OFFENSES, AND WERE, HENCE, IRRELEVANT, INADMISSIBLE, AND HIGHLY PREJUDICIAL.

In our prior unpublished decision upon further review in this case we addressed this same issue and resolved it adversely to appellant. *United States v. Orsburn*, No.

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[1] Upon rehearing appellant was sentenced to a dishonorable discharge, confinement for 18 years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.

25199 (f rev), (A.F.C.M.R. 5 August 1988). We see no reason now to reverse that decision.

In addition to the specific assigned error appellate defense counsel has incorporated in his brief additional issues submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We have examined each and find them to be without merit.

Accordingly, the findings of guilty we previously affirmed and the sentence which was adjudged and approved upon rehearing are

AFFIRMED.

[SEAL]

OFFICIAL:

/s/ Mary V. Fillman
MARY V. FILLMAN
Captain, USAF
Chief Commissioner

APPENDIX C

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 25199 (f rev)

5 Aug. 1988

UNITED STATES

v.

Staff Sergeant STEVEN K. ORSBURN, FR 526-13-0344
UNITED STATES AIR FORCE

Sentence adjudged 4 October 1985 by GCM convened at Luke Air Force Base, Arizona. Military Judge: William H. Karr.

Approved Sentence: Dishonorable discharge, confinement for twenty-five (25) years, forfeiture of all pay and allowance and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Leo L. Sergi and Major Frank J. Spinner.

Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni, Captain Marc Van Nuys and Captain Jeremy L. Fellows.

Before

FORAY, MICHALSKI and MURDOCK
Appellate Military Judges

DECISION UPON FURTHER REVIEW

PER CURIAM:

This case is before us for a further review. In an unpublished opinion, *United States v. Orsburn*, No. 25199 (A.F.C.M.R. 31 July 1986), we affirmed modified findings

of guilty and the sentence as it was adjudged. One of appellant's claims we considered in our original decision was whether:

> THE FINDINGS OF GUILTY CONCERNING ADDITIONAL CHARGE TWO ARE BARRED BY THE STATUTE OF LIMITATIONS.

Although not alleged by appellant, we found this assigned error to be equally applicable to the finding of guilty of Specification 1, Additional Charge I. Specification 1, Additional Charge I, alleged the offense of rape and three specifications of Additional Charge II alleged the offense of sodomy, in violation of Articles 120 and 125, UCMJ, respectively. All of these offenses were alleged to have been committed during divers times beginning 18 November 1982. The dates the offenses were alleged to have ceased were 25 July 1984, as to three of the offenses and 24 April 1985, as to one of the offenses. At the trial of this case the court found appellant not guilty of each offense as alleged but guilty by exceptions and substitutions, as to each offense, of the lesser included offense of indecent acts upon a female under the age of sixteen, with intent to gratify his sexual desires, in violation of Article 134, UCMJ.[1]

In our original opinion we held that since the appellant was found not guilty of violating Articles 120 and 125 but guilty of the lesser included offense of indecent acts in violation of Article 134, the statute of limitations applicable to the offenses was now two years.[2] Since the

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[1] In his action in the case, the convening authority approved only so much of the finding of guilty of one of the offenses as found the appellant guilty of an indecent assault committed between 18 November 1982 and 25 July 1984. The court-martial had found appellant guilty of committing this offense between the dates of 18 November 1982 and 24 April 1985.

[2] Prior to 14 November 1986, pursuant to Article 43, the statute of limitations for offenses in violation of Articles 120 and 125 was three years and for offenses in violation of Article 134 was two years.

affected charges in this case were received by the officer exercising summary court-martial jurisdiction on 21 June 1985, we went on to hold that a conviction for that part of those offenses which were committed by appellant prior to 22 June 1983, was barred by the statute of limitations. We then affirmed modified findings of guilty of these offenses affirming only so much of the findings of guilty as found the accused guilty of committing indecent acts at divers times beginning on 22 June 1983.

On 10 October 1986, pursuant to Article 67(c), appellant petitioned the Court of Military Appeals for review of our decision in the case. On 19 August 1987, that Court granted appellant's petition for review on Issues I and II raised by appellate defense counsel. *United States v. Orsburn*, 25 M.J. 162 (C.M.A. 1987). Issue I is the same issue we discussed in our original decision in the case with respect to the additional charges and Issue II was before the Court of Military Appeals as:

> THE COURT'S ATTENTION IS INVITED TO THE MILITARY JUDGE'S ERROR IN ADMITTING INTO EVIDENCE PROSECUTION EXHIBITS 6, 7, AND 8, BOOKS OF A SEXUALLY EXPLICIT NATURE, WHICH BOOKS WERE NOT SHOWN TO THE ALLEGED VICTIM, NOR WERE THEY USED IN ANY MANNER IN COMMITTING THE ALLEGED OFFENSES, AND WERE, HENCE, IRRELEVANT, INADMISSIBLE, AND HIGHLY PREJUDICIAL.

On 29 April 1988, the Court of Military Appeals further considered the issues on which it had granted review and concluded that this Court should state the evidence it finds to establish that the appellant committed indecent acts with his daughter with the requisite intent subsequent to 21 June 1983. In addition, that Court concluded that we should consider Issue II in light of *United States v. Mann*, 26 M.J. 1 (C.M.A. 1988). Accordingly, that Court set aside our decision in the case and returned

the record of trial to The Judge Advocate General for resubmission to us for further proceedings. *United States v. Orsburn*, —— M.J. —— (C.M.A. 1988).

ISSUE I

We have reviewed the testimony of the victim and other relevant evidence regarding the offenses in issue in light of the mandate of the Court of Military Appeals as to the specific evidence establishing the appellant's guilt. We find that the evidence shows that appellant committed certain indecent acts upon the person of his daughter at the place and during those times as found by the court-martial. However, the evidence considered was not date specific and we are unable to determine whether the evidence of indecent acts committed by appellant pertained to acts committed before 22 June 1983 or acts committed on or after that date. As a result, we are not convinced beyond a reasonable doubt of appellant's guilt of Additional Charges I and II and each specification thereunder. Article 66(c), UCMJ. Accordingly, the findings of guilty of Additional Charge I, Specification 1, and Additional Charge II, Specifications 1, 2, and 3, are set aside and dismissed.

ISSUE II

Prosecution exhibits 6, 7, and 8 are books entitled "Degraded, Delighted Daughter", "Chained Youth: Girls In Bondage", and "The Whore Makers", respectively. The subject matter of two of these books is described in the foreword or introduction of each book as "There is a certain indefinable attraction about young, virginal girls, especially to older men. . . . . Such is our story", and "The following are case histories of young girls who have been sexually molested as children." Each contains vivid fictional accounts of sexual acts committed upon young girls by adult males. The third book, while having no foreword or introduction, likewise contains explicit accounts of sexual acts committed upon young girls. The

exhibits were found in the master bedroom of appellant's on base quarters as a result of a search and seizure conducted by agents of the Office of Special Investigations. They were admitted into evidence by the military judge over the objection of appellant "for the one limited purposes (sic) of their tendency, if any, to either prove or disprove the intent of the lesser included offenses as to assault with the specific intent to commit rape or the specific intent to gratify sexual desires."

The Prosecution Exhibits 6, 7, and 8 were in the possession of appellant close in time to some of the alleged offenses. They were found in the same place as Prosecution Exhibit 4, a book entitled "More Joy Of Sex", which had been introduced into evidence without objection on the part of appellant.[3] Additionally, the subject matter of each tends to embrace the elements of the sexual aberration which appellant was alleged to harbor. Appellant's possession of these items could reasonably be interpreted as showing or tending to show what his sexual desires were during the charged offenses. In light of *United States v. Mann, supra,* we find the military judge did not err when admitting Prosecution Exhibits 6, 7, and 8 into evidence.

The remaining approved findings of guilty are affirmed. The sentence is set aside and a rehearing thereon is ordered.

[SEAL]

OFFICIAL:

/s/ Mary V. Fillman
MARY V. FILLMAN
Captain, USAF
Chief Commisioner

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[3] Prosecution Exhibit 4 had been shown to the victim of the offenses by appellant.

APPENDIX D

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 25199

31 July 1986

UNITED STATES

v.

Staff Sergeant STEVEN K. ORSBURN, FR 526-13-0344

Sentence adjudged 4 October 1985 by GCM convened at Luke Air Force Base, Arizona. Military Judge: William H. Karr.

Approved sentence: Dishonorable discharge, confinement for twenty-five (25) years, forfeiture of all pay and allowances and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Leo L. Sergi and Lieutenant Colonel Michael D. Wims.

Appellate Counsel for the United States: Colonel Kenneth R. Rengert and Major David F. Barton.

Before

FORAY, MURDOCK AND O'HAIR
Appellate Military Judges

DECISION

PER CURIAM:

Appellant was convicted by a general court-martial, with members, of several offenses involving sexual abuse of his daughter who was under the age of sixteen years.

The sentence adjudged in the case extends to a dishonorable discharge, confinement for 25 years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.

One of the appellant's claims on appeal is:

> THE FINDINGS OF GUILTY CONCERNING ADDITIONAL CHARGE TWO ARE BARRED BY THE STATUTE OF LIMITATIONS.

Although not stated by appellant, we find this assigned error to be equally applicable to the finding of guilty of Specification 1, Additional Charge I.

When these additional charges and specifications were preferred and referred to trial they alleged one offense of rape and three offenses of sodomy, in violation of Articles 120 and 125, U.C.M.J. As is pertinent to our inquiry into this allegation of error, the effected additional charges alleged that three of the offenses were committed at divers times between on or about 18 November 1982, and on or about 25 July 1984. The other effected additional charge was alleged to have been committed at divers times between on or about 18 November 1982, and on or about 24 April 1985. These charges were preferred and received by the officer exercising summary court-martial jurisdiction on 21 June 1985, and referred to trial by the general court-martial convening authority on 5 July 1985.

The court-martial, however, did not find appellant guilty as charged in the additional charges, but guilty of lesser included offenses therein, in violation of Article 134, U.C.M.J. Specifically, the court-martial found appellant guilty, by exceptions and substitutions, of committing indecent acts upon the body of his daughter, with the intent to gratify his sexual desires, during the time alleged in each specification of the additional charges.[1]

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[1] In his action on the findings and sentence in the case, the convening authority modified the finding of guilty of Specification 3,

The gravamen of appellant's claim is that since the court-martial found the appellant guilty of lesser included offenses under Article 134, U.S.M.J., rather than those charged, Article 43(c), U.C.M.J., the statute of limitations, mandates the findings of guilty be dismissed. Appellant further contends that although the specifications in question also encompass dates subsequent to 21 June 1983, we may not, by any modifying action, conform the specifications to comply with Article 43(c), U.C.M.J. He reasons that we would be unable to determine whether the necessary number of court members found appellant guilty beyond reasonable doubt of any alleged misconduct occurring subsequent to 21 June 1983.

The offenses originally charged as violations of Articles 120 and 125, U.C.M.J., were not barred from trial by the statute of limitations as they were committed within three years before the signed additional charges alleging their commission were received by the officer exercising summary court-martial jurisdiction over appellant. Article 43(b), U.C.M.J. However, since appellant was not convicted of violating Articles 120 and 125, but was, instead, convicted of violating Article 134, a two year statute of limitations now applies to the offenses. Under the circumstances, we may affirm only so much of the findings of guilty of Specification 1, Additional Charge I, and Specifications 1 and 2, Additional Charge II, as finds that the appellant committed these Article 134 violations between on or about 22 June 1983, and on or about 25 July 1984. With regard to Specification 3, Additional Charge II, we may affirm only so much of the approved finding of guilty as finds the appellant committed this Article 134 violation between on or about 22 June 1983, and on or about 24 April 1985. We are not convinced by appellant's argument that we may not effect these modifications to the findings. Since the court members did not make any exceptions and substitutions to their

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Additional Charge II, as to the place of the commission of the offense.

findings as to the dates alleged in the specifications, it is obvious that at least two-thirds of them found these lesser offenses to also have been committed after 22 June 1983.

We disagree with appellate government counsel's contention that appellant waived his right to assert that the statute of limitations has run regarding these offenses.[2] Pursuant to R.C.M. 907(b)(2)(B), a charge or specification shall be dismissed upon the accused's motion made before final adjournment of the court-martial if:

> The statute of limitations (Article 43) has run, provided that, if it appears that the accused is unaware of the right to assert the statute of limitations in bar of trial, the military judge shall inform the accused of this right.

The record of trial indicates that the military judge did not advise the accused of this right and we are not convinced appellant otherwise knew of this right. *United States v. Wiedemann*, 16 U.S.C.M.A. 365, 36 C.M.R. 521 (1966); *United States v. Troxell*, 12 U.S.C.M.A. 6, 30 C.M.R. 6 (1960).

The other claims of appellant are found to be without merit. Accordingly, the findings of guilty, as modified, and the sentence, which we find to be nonetheless appropriate, are

AFFIRMED.

[SEAL]

OFFICIAL:

/s/ Felix Landau
FELIX LANDAU
Captain, USAF
Chief Commissioner

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[2] No motion to dismiss because the statute of limitations had run was made at trial by appellant.

APPENDIX E

APPEALS—SUMMARY DISPOSITIONS

No. 56370/AF. U.S. v. Steven K. Orsburn. CMR 25199. On further consideration of the granted issues (25 M.J. 162), we conclude that the Court of Military Review should state the evidence it finds to establish that the accused committed indecent acts upon his daughter with the requisite intent after 21 June 1983. We also conclude that the court below should consider Granted Issue II in light of *United States v. Mann*, 26 M.J. 1 (C.M.A. 1988). Accordingly, it is ordered that the decision of the United States Air Force Court of Military Review is set aside. The record of trial is returned to the Judge Advocate General of the Air Force for resubmission to that court for further proceedings.

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(2)

No. 90-997

Supreme Court, U.S.
FILED
JAN 31 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

STEVEN K. ORSBURN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
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Washington, D.C. 20332-6128

QUESTION PRESENTED

Whether the trial judge abused his discretion by allowing the prosecution to introduce three books depicting sexual acts between adult men and young girls in order to prove that petitioner acted with specific intent, an essential element of the lesser included offenses of the crimes charged.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-997

STEVEN K. ORSBURN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial opinion of the Air Force Court of Military Review (Pet. App. 23a-26a) is unreported. The order of the Court of Military Appeals remanding the case to the court of military review (Pet. App. 27a) is reported at 26 M.J. 287. The opinions of the court of military review on remand (Pet. App. 18a-22a) and after resentencing (Pet. App. 15a-17a) are unreported. The opinion of the Court of Military Appeals affirming the final judgment of the court of military review (Pet. App. 1a-14a) is reported at 31 M.J. 182.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 26, 1990. The petition for a writ of

certiorari was filed on December 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Luke Air Force Base in Arizona, petitioner, a member of the United States Air Force, was convicted of rape, four sodomy offenses, and three indecent act offenses, in violation of Articles 120, 125, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920, 925, and 934, respectively. He was sentenced to confinement for 25 years, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction to the lowest enlisted rank. The convening authority modified one of the findings involving indecent acts, but otherwise approved the findings and sentence as adjudged. In its initial review, the Air Force Court of Military Review further modified the findings to conform to the statute of limitations and affirmed the sentence. The Court of Military Appeals remanded the case to the court of military review for further consideration. On further review, the court of military review set aside the findings of guilty on all the indecent act offenses and ordered a rehearing on sentence. On rehearing, petitioner was sentenced to confinement for 18 years, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction to the lowest enlisted rank. Following the rehearing on sentence, the convening authority, the court of military review, and the Court of Military Appeals all affirmed the remaining findings and the sentence.

1. The evidence presented at trial showed that petitioner committed a variety of sexual acts upon his daughter, who was eight years old at the time of trial. Pet. App. 3a. In a preliminary session, petitioner challenged the admissibility of three books that were discovered during a search of his

house: *Degraded, Delighted Daughters*; *Chained Youth: Girls in Bondage*; and *The Whore Makers*. PX 6-8. Petitioner claimed that the books were not relevant and that the risk of undue prejudice outweighed the books' probative value. The trial judge deferred ruling on petitioner's objection until both sides had presented their cases. Tr. 195; Pet. App. 4a-5a. After the prosecution concluded its case-in-chief, petitioner's counsel asked the trial judge if he had "reached a ruling on the admissibility of the books in question." *Id.* at 5a. Before the trial judge ruled, petitioner's counsel said that the defense had not yet made a decision as to what evidence, if any, it would present in petitioner's case-in-chief. The trial judge then ruled that the books were admissible, since a number of the lesser included offenses required the prosecution to prove that petitioner acted with specific intent. In ruling on petitioner's objection, the trial judge stated:

> I have specifically considered the potential prejudicial impact in accordance with [Mil. R. Evid.] 403 and I find that the relevance overcomes any possible prejudice. I will of course instruct the members of the court as to the sole use that they can apply these books to.

Pet. App. 7a.

After announcing his ruling, the trial judge permitted the prosecution to re-open its case-in-chief in order to present the books to the court-martial panel. At that time, the trial judge instructed the panel:

> Members of the court, as I have admitted into evidence Prosecution Exhibits 6, 7, and 8, which you have not heard, but you've heard the titles of these particular paperback books, there is the possibility that some people could, per chance, be offended by the subject matter of these books. I want to bring [to] your attention and emphasize that the possession of these books is not

> illegal. There is nothing alleged by the prosecution that there is anything about the substance or the books themselves which is illegal. I have admitted these books for the sole purpose, for a very limited purpose, and the only purpose which you could consider these books for or any evidence that they might have to tend to prove or disprove a specific intent of which I will instruct you later as to some of the lesser included offenses, that would be the attempt to commit a certain crime or the intent to satisfy sexual gratification. The intent would be the only reason that you can consider these books to determine whether it tends to prove or disprove that intent. You may not conclude from this evidence that the accused is a bad person, a person of bad moral character, or otherwise inclined to commit these or any other crimes.

Pet. App. 8a-9a. At the conclusion of all the evidence, before the court-martial panel began deliberations, the trial judge reminded the members of the panel of the limited purpose for which the books could be considered. He instructed them:

> I want to direct your attention to the Prosecution Exhibits 6, 7 and 8, once again, and I want to emphasize to you the very limited purposes for which I have allowed these three exhibits into evidence in this trial. They may be considered by you for the one limited purpose of their tendency, if any, to either prove or disprove the intent of the lesser included offenses as to assault with the specific intent to commit rape or the specific intent to gratify sexual desires. You may not consider this evidence for any other purpose, and you may not conclude from this evidence that the accused is a bad person, a person of bad morals, has criminal tendencies, and that he therefore committed the offenses as charged.

Pet. App. 9a.

2. The Air Force Court of Military Review affirmed the trial judge's ruling. Pet. App. 16a-17a, 22a. The court noted that each of the books dealt with "fictional accounts of sexual acts committed upon young girls by adult males" and was relevant "to show what [petitioner's] sexual desires was during the charged offenses." *Id.* at 21a-22a.

3. The Court of Military Appeals affirmed the lower court's decision by a divided vote. The majority rejected petitioner's argument that the books were irrelevant and unduly prejudicial. Pet. App. 10a-13a. Chief Judge Everett filed a brief dissenting opinion in which he concluded that the trial judge abused his discretion in applying the Mil. R. Evid. 403 balancing test. Pet. App. 14a.

ARGUMENT

Petitioner argues that the trial judge abused his discretion by admitting the three books into evidence.

Petitioner's argument rests on the premise that his intent was not a material issue in this case. Pet. 7. Both military appellate courts correctly rejected that claim. Any element of an offense that the prosecution must prove beyond a reasonable doubt is a material issue unless the accused enters a guilty plea or affirmatively removes that element from consideration by the trier of fact. "A simple plea of not guilty," like the one petitioner entered, "puts the prosecution to its proof as to all elements of the crime charged." *Mathews* v. *United States*, 485 U.S. 58, 64-65 (1988).

In this case, the indecent act offenses, the lesser included offenses of rape and sodomy, are specific intent crimes. Petitioner's not guilty plea therefore forced the government to prove that he acted with specific intent. Moreover, petitioner took no action, such as stipulating to the element of intent, that relieved the prosecution of its burden of proof on that element. Indeed, at the time the trial judge ruled on the

admission of the evidence at issue, petitioner was unwilling to commit himself as to how he planned to proceed. Pet. App. 12a. The trial judge therefore acted within his broad discretion in admitting the books because they were relevant to a material issue in the case. See *Hamling* v. *United States*, 418 U.S. 87, 124-125, 127 (1974).

Petitioner contends in passing that the trial judge should have waited until after the defense had presented its case before allowing the government to present the evidence at issue here. Pet. 8. But Mil. R. Evid. 404(b) imposes no such requirement.[1] The rule lists the situations in which "other acts" evidence may be admitted, but it does not require that the trial judge wait until the defense has completed its case before ruling on the admissibility of evidence offered by the prosecution. The timing of such decisions has historically been left to the sound discretion of the trial courts. As this Court has observed in connection with Fed. R. Evid. 404(b), "[t]he trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial, and we see nothing in the Federal Rules of Evidence that would change this practice." *Huddleston* v. *United States*, 485 U.S. 681, 690 (1988).

Petitioner further alleges that the prejudicial impact of the books far outweighed their relevance. Pet. 9-10. A trial judge, however, has broad discretion in balancing the probative value of evidence against the risk of undue prejudice.

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[1] Mil. R. Evid. 404(b), which was taken from and is similar to Fed. R. Evid. 404(b), provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

United States v. *Abel*, 469 U.S. 45, 54 (1984). The court of military review and the Court of Military Appeals correctly held that the trial judge did not abuse that discretion here. Pet. App. 13a, 22a. Petitioner was adequately protected from the risk of undue prejudice by the four safeguards identified in *Huddleston* v. *United States*, 485 U.S. at 691-692: the Rule 402 requirement that the evidence be relevant; the Rule 404(b) requirement that the evidence be admitted for a proper purpose; the balancing of the probative value of the evidence against its potential for undue prejudice required by Rule 403; and the requirement in Rule 105 that upon request the trial judge must instruct the trier of fact about the limited purposes for which the evidence may be considered. The trial judge applied each of those safeguards when he admitted the three books, and his ruling did not deny petitioner his right to a fair trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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